NO. 93-1763

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1992

VALENTINE SUGARS INC.,
Petitioner

versus

DONAU CORPORATION
and
KRISHAN K. SUDAN
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the notice requirement under the due process clause satisfied when the notice of arbitration does not make specific reference to the matter decided by the arbitrators but does contain a broad notice of arbitration that seems to give the arbitrators jurisdiction over "anything under the sun"?

2. Was this award rationally inferrable from the agreements between the parties or was it a material mistake of fact?

3. Do the arbitrators have to state that they relied upon a particular fact in order for the court to determine that they relied upon a material mistake of fact or may a court infer reliance from the language of the award?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit are those in the caption (appellants in No. 92-3276). There are no undisclosed parties.

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

VALENTINE SUGARS INC.,
Petitioner

versus

DONAU CORPORATION and KRISHAN K. SUDAN
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit and denial of rehearing entered on March 1, 1993.

OPINIONS BELOW

The decisions of the district court in vacating the arbitration award and later confirming the arbitration award are not reported. The decision of the court of appeals is reported at 981 F 2d 210 (5th Cir.1993).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on March 1, 1993. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

9 U.S.C. Section 11 (a) allows vacatur of an award in arbitration "[W]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."

STATEMENT OF THE CASE

These proceedings were initiated in 1986 in the District Court upon a petition for injunctive relief against defendants Donau and Sudan. A stay of the judicial proceedings were obtained by defendants so they could pursue their arbitration remedies provided in some of the agreements between the parties. Almost five years later the defendants initiated the arbitration proceedings before the Commercial Arbitration section of the American Arbitration Association. In the notice of arbitration, ownership of the spray dryer was not placed in issue. There is no colorable claim of ownership of the spray dryer in formulating its award to the defendants. The relevant portion of the arbitration award reads as follows, [bracketed material added]:

> RESPONDENT [Valentine] fully owns spray drying equipment formerly owned by Valdon free of any ownership claims by Claimant [Donau and Sudan] or Valdon [a company owned by Valentine and Donau].

> RESPONDENT shall pay to CALIMANT the sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS.
>
> RESPONDENT shall pay to CLAIMANT $0.03/pound for all spray dried product produced after January 1, 1991 on the spray drying equipment formerly owned by Valdon. [Emphasis added]

The structure of the award leads to the conclusion that the arbitrators believed that the spray dryer was formerly owned by Valdon and the award made to defendants was in compensation for the divestiture of their interest in the spray dryer. The Fifth Circuit was in error in holding that, "Valentine cannot demonstrate with adequate certainty that the arbitrators strongly relied upon the punitive fact that Valdon once owned the spray dryer in making its award," supra, p 214. The arbitrators do not have to state "We rely upon the fact that Valdon formerly owned the spray dryer," in order for a court to find that they did so.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT HOW SPECIFIC A NOTICE OF ARBITRATION MUST BE IN ORDER FOR ARBITRATORS TO HAVE JURISDICTION OF THAT ISSUE

In the instant case the Fifth Circuit stated that, "Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be," supra, p. 213. If so, then there would be no reason for even having the notice requirement.

The lower court obviously confused the issues of the scope of an arbitration clause in a contract and in the scope of an arbitration proceeding. The former is controlled by the terms of the arbitration clause; whereas, the latter is determined by the Rules of Commercial Arbitration published by the American Arbitration Association and the specific terms of the notice of arbitration filed in the proceedings before the arbitrators. Those are the rules to which the parties agreed to abide.

The issue of notice is based upon the documents filed with the American Arbitration Association. Rule 6(A) of the Commercial Arbitration Rules of the American Arbitration Association, as amended and in effect January 2, 1991, provides:

> The initiating party (hereinafter claimant) shall, within the time period, if any, specified in the contract(s), give written notice to the other party (hereinafter respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested* * *.

Rule 8 thereof provides:

> After filing of a claim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy shall be mailed to the other party, who shall have a period of ten days from the date of such mailing within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator consent.

The notice in this case provides, in relevant part as follows:

> WHEREFORE NOTICE IS HEREBY GIVEN THAT [Donau and Sudan] have filed a demand for arbitration with the American Arbitration Association to arbitrate a dispute concerning a commercial matter involving several contracts signed on the 29th day of June 1984, copies of which are produced with this Notice and are referred to as follows:
>
> * * * * * * * *
>
> (h) a contract entitled "Lease Agreement" between VSI and Valdon whereby the lessor leased property described on Exhibit A to Valdon which lease was to commence upon the installation of all machinery and equipment and notice to that effect having been given and received;
>
> * * * * * * * *

In the statement setting forth the nature of the dispute, there is no claim made by Donau or Sudan that they have any ownership interest or that Valdon has any ownership interest in the leased equipment. The description of the Lease Agreement did not let forth any claim of ownership by Valdon and/or the defendants. None of the contracts were alleged in the notice of arbitration to have provided therefor. The only reference to any claim of ownership by Valdon of the spray dryer was in Donau's and Sudan's reply brief before the arbitrators, filed August 26, 1991. The claim was not thus put before the arbitrators in that manner or at that time, especially without seeking and obtaining leave to do so upon an amended notice of arbitration. (AAA Commercial Arbitration Rule 8) The eviden-

tiary aspect of the hearings had already been closed. It was clearly too late to interject a new issue into the case. It would have been improper to have so raised the issue in the opening brief of Donau and Sudan, much less in the reply brief when the appellant had no further opportunity to respond. Thus, the issue of ownership of the spray dryer was not before the arbitrators and any usurpation of that issued by the arbitrators clearly exceeded their authority under the Rules and the terms of the arbitration clause of the relevant contracts.

The Fifth Circuit in its opinion, said (id., p.213):

> * * * Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be. In the absence of a congressional mandate, we will not develop a code pleading here.

The lower court overlooked the provisions of the AAA Commercial Arbitration Rules which delimited the inquiry based upon the scope of the notice of arbitration. There is no need to establish a federal code of arbitration pleading. There is merely the need to follow the rules of the association to whom the parties agreed to submit themselves to arbitration and not ignore the due process requirements of notice.

A. The Fifth Circuit Erred in Holding that the Joint Venture Agreement's Broad Language Placed the Ownership of the Spray Dryer before the Arbitration Panel

The Fifth Circuit Panel looked to the arbitration clause in the Joint Venture Agreement to impose the status of arbitrability upon the issue of ownership of the spray dryer; however, the Lease Agreement was the document that determined ownership of the spray dryer and

that document did not have an arbitration clause. The Lease Agreement did not have an arbitration clause because the ownership of the spray dryer was established and was not up for consideration. The lower court looked to *Neal v. Hardee's Food Sys., Inc.*, 918 F2d 34, 37 (5th Cir. 1990) for the principles governing the arbitrability of multiple agreements, some not expressly providing therefor, when the individual agreements were an integral and interrelated part of one venture. Although Neal might stand broadly for the proposition that contracts on the same venture which are interrelated and thus may be construed in pari materia may be subjected to arbitration when the principal agreement provides for arbitration, that case clearly does not stand for the proposition that an agreement thus absorbed into another agreement's reservation of the arbitration remedy may be construed in direct conflict with its terms. In other words, the Lease Agreement did not have an arbitration clause and the Joint Venture Agreement did. Therefore, the subject of the Lease Agreement, the ownership of the spray dryer, cannot become subject to arbitration because of the broad language of the Joint Venture Agreement.

B. The award of the arbitrators was not rationally inferable from the agreements between the parties

Clearly, Valentine was the only party with any ownership interest in the spray dryer. It was the only party to derive an economic benefit of ownership (rentals), and it would have been the only party which could have sold the equipment to Valdon. It was the only owner of the spray drying equipment. It purchased it. It did not sell it. Any interpretation of the contracts, separately or in combination with each other, which would find an ownership interest in the spray dryer by Valdon or the defendant would be squarely in conflict with the contracts the arbitrators

were supposed to have been interpreting and enforcing. There was no rational basis for contending that Valdon owned the spray dryer or for the arbitrators' determination that Valdon formerly owned the spray dryer. Thus, the award was not "rationally inferable from the agreements." supra, p. 214, citing *Anderman/Smith Co. v. Tennessee Gas Pipeline Co.*, 918 F2d 1215, 1218 (5 Cir. 1990). Thus, the arbitrators exceeded their authority when they proceeded to make the award of the spray dryer to its already owner and declared that the spray dryer had been formerly owned by Valdon.

II. The Fifth Circuit Erred in Holding that Valentine Failed to Prove that the Arbitrators Strongly Relied Upon the Fact that Valdon Formerly Owned the Spray Dryer in Making its Award.

The Fifth Circuit missed the issue of the mistake of fact argument in Valentine's briefs, stating that its "decision rests upon the statutory requirement that the mistake be 'material,' or in the words of the Sixth Circuit, the record must 'demonstrate strong reliance on that mistake' in making the award." Valentine, supra, p. 214. The lower court then proceeded to state that "Valentine cannot demonstrate with adequate certainty that the arbitrators strongly relied upon the punitive fact that Valdon once owned the spray dryer in making its award." Ibid.

The award of the arbitrators demonstrates their reliance upon their statement that the spray dryer was formerly owned by Valdon and this was the basis of the award. They said so twice, as follows:

> RESPONDENT fully owns spray drying equipment **formerly owned by Valdon** free of any ownership claims by Claimant or Valdon.

> RESPONDENT shall pay to CALIMANT the sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS.
>
> RESPONDENT shall pay to CLAIMANT $0.03/pound for all spray dried product produced after January 1, 1991 on the spray drying equipment **formerly owned by Valdon.** [Emphasis added]

The structure of the award leads to the conclusion that the award made to defendants was in compensation for the divestiture of their claimed interest in the spray dryer.

CONCLUSION

The arbitrators exceeded their jurisdictional authority. The ownership of the spray dryer was never a proper subject of arbitration, either under the contracts or the notice of arbitration. The arbitrators' mistake of fact was clearly "material" and strongly relied upon by the arbitrators - they said so twice. All of the awards made by the arbitrators were directly related to the false assumption that Valdon formerly owned the spray dryer. Valdon never owned the spray dryer. The arbitrators had no authority to:

(1) Award to Valentine the spray dryer it already owned.

(2) Determine the ownership interests of the parties in the spray dryer.

(3) Compensate the defendants for their imagined interest in the spray dryer.

The arbitrators were engaged in imposing upon Valentine their "own brand of industrial justice." *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Assoc.*, 889 F2d 599, 602 (5th Cir. 1989), cert den., 111 S. Ct. 148, 112 L.Ed.2d 114 (1990). For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

VALENTINE SUGARS INC.,
Plaintiff-Appellant,

v.

DONAU CORPORATION et al.
Defendants-Appellees.

Nos. 92-3276, 92-3462.

United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1993.

Joint venturer appealed from judgment of the United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., which upheld arbitrators' award. The Court of Appeals, Jerry E. Smith, J., held that: (1) demand for arbitration was broad enough to give the arbitrators power to do whatever was necessary to resolve any disputed matter arising out joint venture, and (2) joint venturer did not establish that award was based on undisputed mistake of fact.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

I.

A.

Donau Corporation is a marketing corporation owned by Krishan Sudan. In 1984, Sudan approached Gus Baldwin, the manager of Valentine Sugars, Inc., regarding a possible joint venture to produce spray-dried phenolic resins for use as adhesives in the manufacture of waferboard.[1] Valentine already produced phenolic molding compounds. Sudan convinced Baldwin that a dryer could be acquired and installed at the Valentine plant for under one million dollars. He projected that the venture could earn handsome profits by the first quarter of 1985 with an additional $400,000 in working capital. The companies formed the joint venture as Valdon, Inc.

The parties executed a number of agreements on June 29, 1984, under which Sudan was to provide his secret formula for liquid resin; Valentine then would produce the resin and sell it to Valdon. Valentine was to purchase and install a spray dryer on its property, which Valdon was to lease and use to spray dry the liquid resin. Sudan was to provide technical assistance for spray drying and then market the powder through Donau.

The agreements provided for compensation for both parties. Valentine would receive cost plus three percent in making the resin, return of its investment in the spray

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[1] Waferboard replaces plywood in housing construction. It is made of large wood chips adhered with phenolic resins in powdered form. The resins begin as organic liquids; the spray drying apparatus then transforms them to powder form. Manufacturers use the powder form to produce the waferboard.

dryer, monthly rent for the lease of its equipment and premises, and half of Valdon's profits. *After* Valentine had recouped its investment in the dryer, Donau was to receive royalties on the liquid resin sold to Valdon, royalties from Valdon on dry powder produced, commissions from Valdon on sales, and one-half the profits of Valdon.

According to the lease agreement, Valentine was to own the spray dryer and receive a monthly rental of $3,000 plus 1/96 of the investment cost, plus interest from Valdon for a period of eight years. At the end of eight years, Valdon would have the option of purchase at fair market value or extension of the lease term. The parties amended the joint venture agreement to reduce Donau's royalties until Valentine had recouped its investment.

Valentine purchased a used spray dryer and had it installed at a total cost of over $3.5 million. Valentine began manufacturing phenolic resins, and Valdon spray dried them. The resins turned out to be faulty, and Donau was unable to make any sales. According to Sudan, the resins did not work because Valentine refused to purchase additional equipment for use in the drying process.

After the spray dryer lay idle for three years, Valentine entered a Toll Manufacturing Agreement with Georgia-Pacific Corp. whereby Valentine is paid to spray dry Georgia-Pacific's liquid phenolic resins. Between April 1989 and November 1990, Valentine spray dried over thirteen million pounds of powdered resin. Valentine contends it still has not recouped its investment, so Donau is not entitled to royalties. Apparently, Sudan was correct that the dryer needed the additional equipment, as Valentine added the necessary equipment to the dryer before producing powder for Georgia-Pacific.

B.

Valentine filed a diversity action seeking an injunction and damages on January 6, 1986. A year later, the district court stayed the proceedings pending arbitration. The arbitration hearings finally began on June 24, 1991, before a panel of the American Arbitration Association's Commercial Arbitration Tribunal, which issued its two-page award on September 16, 1991. The relevant portion of the award reads as follows:

> All agreements have been terminated as of January 3, 1986.
>
> Donau Corporation and Krishan Sudan (hereinafter referred to as CLAIMANT) are not entitled to any royalty payment for liquid or spray dried products produced by Valentine Sugars, Inc. (hereinafter referred to as RESPONDENT) or by Valdon prior to January 3, 1986.
>
> RESPONDENT fully owns spray drying equipment formerly owned by Valdon free of any ownership claims by CLAIMANT or Valdon.
>
> RESPONDENT shall pay to CLAIMANT the sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS.
>
> RESPONDENT shall pay to CLAIMANT $0.03/pound for all spray dried product produced after January 1, 1991 on the spray drying equipment formerly owned by Valdon.

Donau and Sudan moved, in the district court, on October 2, 1991, to confirm the arbitrator's award and enter

judgment. Valentine moved to vacate, modify, or amend the award. The district court vacated the award, directing the parties to resubmit the matter either to the original arbitration panel or to a new panel for rehearing. On February 24, 1992, after reconsidering its decision, the district court confirmed the arbitration award and entered judgment.

Valentine moved to alter or amend the judgment and filed a notice of appeal on March 23, 1992, after that motion was denied. The district court denied Valentine's motion for reconsideration on April 9, 1992. Donau and Sudan began proceedings to enforce the judgment, as Valentine had not posted bond. On April 16, 1992, these proceedings were stayed, as Valentine apparently had filed for bankruptcy. Valentine filed a second notice of appeal on May 8, 1992; the appeals were combined.

II.

[1-3] Valentine first argues that the arbitrators exceed their authority by deciding an issue not before them—the ownership of the spray dryer. Valentine claims that Donau did not properly raise the issue of ownership in the notice of arbitration, as no specific language in that notice raises the issue.[2] If the arbitrator exceeded his power, the district court may vacate the award. *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir.1990). In determining whether the arbitrator exceeded his jurisdiction, we resolve all doubts in favor of arbitration, *Moses H. Cone*

---

[2] Certainly, the borad arbitration clause in the joint venture agreement makes the ownership of the dryer a proper subject of arbitration. That clause calls for arbitration of any dispute "relating to or arising out of" the agreement. When parties include such a broad arbitration clause, they intend the clause to reach all aspects of the relationship. *Neal v. Hardee's Food Sys.*, 918 F.2d 34, 37-38 (5th Cir.1990).

Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

[4] The demand for arbitration asked the panel to arbitrate "a dispute concerning a commercial matter involving several contracts signed on the 29th day of June, 1984...." We think this broad language gave the arbitrators the power to do whatever was necessary to resolve any disputed matter arising out of the joint venture. Certainly, as Valentine argued in its brief, the ownership of the spray dryer should be determined with reference to these agreements. In addition, the notice of arbitration requests the arbitrators to "determine the amount due and payable to the Plaintiffs..." This broad language again seems to request the arbitrators to determine what Valentine owes Donau under the collection of agreements. Given the presumption of arbitration, we hold that the broad language in the notice of arbitration sufficiently placed the ownership of the spray dryer before the arbitration panel.

[5] We sympathize with Valentine, as Donau wrote a broad notice of arbitration that seems to give the arbitrators jurisdiction over anything under the sun relating to the joint venture agreement. The parties agreed to arbitration, however, and must accept the lose procedural requirements along with the benefits which arbitration provides. An arbitrator, in his discretion, may choose not to address an issue without giving the opposing party better notice and an opportunity to respond. Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be. In the absence of a congressional mandate, we will not develop a code of pleading here.

Valentine improperly relies upon *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889

F.2d 599 (5th Cir.1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). There, we vacated an arbitration award reinstating an employee because the arbitrator exceeded the express limitations of his contractual mandate. In reinstating the employee, the arbitrator took an action forbidden by the underlying collective bargaining agreement. Here, Valentine can point to no contractual provision that removes the ownership of the spray dryer as an issue to be decided by an arbitrator.

Our decision in *Totem Marine Tug & Barge v. North Am. Towing*, 607 F.2d 649 (5th Cir.1979), presents a more similar factual scenario. There, we held that the arbitrator exceeded his power by awarding damages that the plaintiff did not list and admitted were not an issue in the case. We distinguish *Totem Marine* as well. There, the plaintiff admitted to the arbitration panel that the case did not present the issue and, in reliance upon that representation, the defendant failed to put on any evidence for that issue. Here, Donau submitted damage statements to the arbitrators, alleging it owned the spray dryer and never made any representations that the issue was not before the panel.

III.

Next, Valentine argues that we should vacate the award because it is based upon a material mistake of fact. Title 9 U.S.C. § 11(a) allows us to vacate an award "(w)here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." The Sixth Circuit has held that "where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award, it can fairly be said that the arbitrator 'exceeded

[his] powers or so imperfectly executed them' that vacation may be proper." *National Post Office v. United States Postal Serv.*, 751 F.2d 834, 843 (6th Cir.1985).

[6] We interpret the term "undisputed" to mean we should look to see whether there is any rational basis for disputing the truth of the fact. *See Anderman/Smith Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991) (award must at least be rationally inferable from the agreeement). In other words, just because Donau contends it owns the spray dryer does not make ownership disputed; Donau must have some rational basis for its argument. Although Valentine has made a strong argument that no rational finder of fact could determine that Valdon once owned the spray dryer, we need not reach this issue.

Instead, our decision rests upon the statutory requirement that the mistake be "material," or in the words of the Sixth Circuit, the record must "demonstrate[ ] strong reliance on that mistake" in making the award. Valentine cannot demonstrate with adequate certainty that the arbitrators strongly relied upon the punitive fact that Valdon once owned the spray dryer in making its award.

Valentine contends that the arbitrators relied upon the mistake of fact in awarding the lump sum of $600,000 and the three cent royalty. Essentially, Valentine contends that the arbitrators liquidated the joint venture awarding it the ownership of the machine and giving Donau monetary compensation. Although Valentine may be entirely correct, it only provides one theory of how the arbitrators reached their decision. Donau provides alternative explanations for the two awards.

[7,8] Donau contends the arbitrators may have awarded the lump sum as an award of past damages based upon post-termination royalties due on the Georgia-Pacific contract. Donau argues the royalty award was a reasonable royalty for the use of Donau's technology as provided for after termination of the agreements between the parties. Arbitrators need not provide reasons for their award. *E.G., Antwine v. Prudential Bache Sec.*, 899 F.2d 410, 412 (5th Cir.1990). If the award is rationally inferable from the facts before the arbitrator, we must affirm the award. *See Anderman/Smith.*

Applying *Anderman/Smith* to the circumstances before us, we conclude that we must affirm the arbitrators' award if Donau can provide any rational explanation for the award inconsistent with Valentine's theory that the award had to be based upon Valdon's former ownership of the spray dryer. Finding Donau's explanations rational, we must affirm the decision of the district court; we cannot determine with certainty that the arbitrators based the two awards in question upon Valdon's former ownership of the spray dryer.

IV.

[9] Valentine also argues the arbitrators had no jurisdiction to decide the case, because they did not take oaths as required by Louisiana law. Further, Valentine charges the award is contrary to public policy. We need not decide either of these issues, as Valentine waived them by not raising them in the district court.

Finally, in desperation, Valentine argues that the arbitrators'

award is ambiguous. We consider this claim to be without merit, as the award is sufficiently pellucid when interpreted rationally.

The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 92-3276 &
92-3462

FILED
MAR 1 1993

VALENTINE SUGARS, INC.,
Plaintiff-Appellant,

versus

DONAU CORPORATION,
KIRSHAN K. SUDAN, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 1, 1993)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered causes be and the same is hereby **DENIED**.

ENTERED FOR THE COURT:

/s/ J. Smith

United States Circuit Judge

REHG-4

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

NO. 92-1763

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

VALENTINE SUGARS, INC.,
Petitioner

versus

DONAU CORPORATION
and
KRISHAN K. SUDAN
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit properly confirmed a commercial arbitration award which is rationally inferable from the wording or purpose of the contracts among the parties?

2. Whether a dispute over ownership of a piece of equipment was properly before the arbitration panel pursuant to a broad arbitration clause providing that "[a]ny dispute relating to or arising out of this Agreement . . . shall be decided by arbitration. . . ."?

3. Whether this Court should consider Petitioner's due process argument with respect to adequacy of notice where Petitioner failed to raise it below; and whether, in any event, the broad notice of arbitration given was sufficient to support the arbitration award?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Donau Corporation ("Donau") and Krishan K. Sudan ("Sudan"), submit this brief in opposition to the Petition for a Writ of Certiorari filed by Valentine Sugars, Inc. ("Valentine").

STATEMENT OF THE CASE

The commercial arbitration in this case concerned a dispute between the parties to a failed joint venture. Because the arbitrators did not — and were not required to[1] — make factual findings, the following is a brief summary of the contentions and evidence presented by Donau and Sudan in the arbitration proceedings.

In 1984, Donau and Sudan entered into a joint venture arrangement with Valentine for the purpose of manufacturing and selling spray dried phenolic resin in powder form for waferboard/OSB.[2] Pursuant to this arrangement, Valentine was to produce liquid resins using technology developed by Sudan. The corporation formed by the joint venture, Valdon, Inc., was

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[1] *E.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed. 2d 1424 (1960); *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990).

[2] Waferboard/OSB is a forest-based panel board composed of large wood chips adhered with phenolic resins mainly in powdered form.

to purchase these liquid resins and transform them into powdered form using a cone-bottom spray dryer with technology pioneered by Sudan. The spray dryer to be used by the joint venture already had been located by Donau and Sudan and, being central to the purpose and formation of the joint venture, was specifically identified in the Joint Venture Agreement. Valentine was to provide the financing necessary for the acquisition of the spray dryer and other necessary equipment for the sole benefit of the joint venture. This arrangement was set forth in a series of agreements, each executed on June 29, 1984.[3] The agreements required Valentine and Valdon to commence the manufacture of products not later than June 1985 and restricted use of Donau's and Sudan's technology for the sole purpose of manufacturing products for sale by or through Valdon.

Although the initial preparatory steps for the commencement of production proceeded as planned, Valentine advised Donau and Sudan just prior to the contractual deadline that it did not intend to provide all the necessary equipment to commence commercial production. Unbeknownst to Donau and Sudan, Valentine had begun negotiating a toll production agreement with a third party resin producer.

Donau provided Valentine with notice of default on the

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[3] The primary agreement was the Joint Venture Agreement (Rec. Vol. 2 at 359). Each of the following agreements is referenced in and attached to the Joint Venture Agreement: VSI Waferboard License (Rec. Vol. 2 at 329); Manufacturing Agreement (Ex. P-128); Valdon License (Rec. Vol. 2 at 393), Lease (Rec. Vol. 2 at 422); Sales Agreement (Ex. P-129); Voting Trust (Ex. P-130); VSI Molding Compound License (Rec. Vol. 2 at 407); Confidentiality Agreement (Rec. Vol. 2 at 372).

ground that Valentine had failed to commence the manufacture of products within the specific time. Donau also reminded Valentine of its obligations to protect the confidentiality of Donau's and Sudan's technology. Despite these notices, Valentine did not cure the default, canceled one of the agreements between the parties on January 3, 1986, and instituted this action on January 6, 1986.

In 1990, over four years later, Valentine entered into a three year contract with Georgia-Pacific Corporation to spray dry liquid resin supplied by Georgia-Pacific. In order to fulfill this contract, Valentine utilized the spray dryer purchased, according to the Joint Venture Agreement, "for Valdon's manufacturing process" and modified per Sudan's innovations.

Donau and Sudan contended in the arbitration that Valentine breached the various joint venture agreements in several respects:

(1) Valentine failed to use its best efforts to obtain the equipment necessary for Valdon's manufacturing process;

(2)Valentine failed to manufacture products within the time period specified by contract and, when served with a notice of default, failed to cure that default;

(3) Valentine engaged in negotiations with a potential competitor of Valdon in 1985 in violation of the exclusivity provisions of the agreement, as well as its fiduciary duties as a participant in the joint venture;

(4) Valentine misappropriated for its own benefit the licensed technology provided by Donau and Sudan under the pretense that the joint venture was not feasible, and failed to pay applicable royalties; and

(5) Valentine disclosed licensed technology to third parties in violation of the various confidentiality agreements.

Donau and Sudan suggested several damage calculations to the arbitrators based, *inter alia*, on royalties of one, three, five and eight cents per pound as specified in the various agreements, a 2% sales commission provided in one of the agreements, and a division of profits specified in the Joint Venture Agreement. (Rec. Vol. 2 at 523-26). The damage claims were based on actual and projected poundage production.

After conducting five days of hearings and receiving briefs from the parties, the arbitration panel issued the following award:

> All agreements have been terminated as of January 3, 1986.
>
> Donau Corporation and Krishan Sudan (hereafter referred to as CLAIMANT) are not entitled to any royalty payment for liquid or spray dried products produced by Valentine Sugars, Inc. (hereinafter referred to as RESPONDENT) or by Valdon prior to January 3, 1986.
>
> RESPONDENT fully owns spray drying equipment formerly owned by Valdon free of any ownership claims by CLAIMANT or Valdon.
>
> RESPONDENT shall pay to CLAIMANT the sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS.
>
> RESPONDENT shall pay to CLAIMANT $0.03/pound for all spray dried product produced after

January 1, 1991 on the spray drying equipment formerly owned by Valdon.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Found That the Award Was "Rationally Inferable" from the Contracts Between the Parties.

The questions raised by Valentine do not merit review nor does Valentine articulate any "special and important reasons" to support its argument that this Court should exercise its discretionary power of review. Rather, the Petition is nothing more than a plea by a dissatisfied litigant that the court below committed an error which this Court should now correct.

In essence, Valentine argues that the arbitrators made a material mistake concerning a fact which was not properly before them. According to Valentine, the arbitration award can only be read as "compensation for the divestiture of their [Donau's and Sudan's] interest in the spray dryer." Petition at 3; *see id.* at 9.[4] Valentine's central argument, however, is pure speculation. It ignores the evidence and contentions presented by Donau and Sudan to the arbitration panel as well as the alternative explanation of the award offered by Donau and Sudan found to be rational by the court below. Valentine's speculation cannot satisfy its very great burden of proving that the arbitrators exceeded their powers.

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[4] Before the Fifth Circuit, Valentine similarly contended that "the only discernable basis of the lump sum award of $600,000.00 and the 3 cents/pound royalty is as a liquidation of Valdon in an erroneously conceived equitable distribution to the claimants." Original Brief for Appellant at 21 (filed June 22, 1992).

The court below properly recognized that it was required to affirm the arbitration award in view of the "rational explanation" provided by Donau. 981 F.2d at 214. Thus, the Fifth Circuit applied earlier decisions recognizing that "courts will defer to the arbitrators' resolution of the dispute whenever possible" and that an arbitration award must be sustained where it is "rationally inferable" from the facts. *See Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2799, 115 L.Ed. 2d 972 (1991). Significantly, Valentine nowhere takes issue with this principle of law. Rather, Valentine simply argues that it was not properly applied in this case.

An examination of the result reached by the arbitrators in the context of the evidence and contentions presented to the arbitration panel by Donau and Sudan demonstrates that each element of the award has a plausible basis in the joint venture arrangement among the parties:

First, the arbitrators declared the various agreements among the parties terminated as of January 3, 1986. This date corresponds with the date Valentine canceled one of the agreements. Moreover, Valentine had not cured its default within the sixty-day cure period by this date. For all practical purposes, the joint venture arrangement was then dead.

Second, the arbitrators ruled that Donau and Sudan were not entitled to royalties on products produced prior to that date. This portion of the award is explainable because Valdon did not sell products prior to that date, although some product was produced.

Third, the arbitrators quieted title with respect to the spray drying equipment in favor of Valentine, Donau and Sudan having claimed that Valdon owned the spray dryer. (*See* discus-

sion at n.9, *infra*.) Through this portion of the award, the arbitrators recognized Valentine's ownership of the spray dryer. The award does not on its face transfer ownership. Significantly, Valentine does not argue with the result that title was quieted in its favor.

Fourth, the arbitrators awarded Donau and Sudan a lump sum of $600,000. This amount is less than the amount of past damages sought by Donau and Sudan based on post-termination royalties set forth in the contracts. Indeed, the royalties due to Donau based on the production arising out of the Georgia-Pacific contract alone would amount to more than $600,000. Thus, the $600,000 lump sum award could very plausibly constitute compensation for the accrued royalty to Donau and Sudan as of the date of the arbitration award. Significantly, Valentine once suggested this interpretation of the award in one of its memoranda to the district court:

> No royalties were awarded to defendants for the periods prior to the date the arbitrators declared the agreements were terminated, *i.e.*, January 3, 1986. The reference in the second paragraph, pertaining to royalties (prior to January 3, 1986), intimates that royalties would be due after that date. By implication, the $600,000 award represents royalties for the period between January 3, 1986 and January 1, 1991.

(Rec. Vol. 3 at 772).

Fifth, the arbitrators awarded Donau and Sudan 3¢ per pound for all spray dried product produced after January 1, 1991. This award is less than the post-termination royalty provisions of the agreements which covered spray dried products.

In view of Valentine's conduct in misappropriating confidential technology and usurping joint venture opportunities, the lump sum award and continuing royalty are easily understandable. In this context, the lower court correctly ruled that Valentine had not demonstrated that the arbitrators "strongly relied" on a mistake of fact. 981 F.2d at 214. The Fifth Circuit's analysis is consistent with the teachings of this Court:

> The courts are not authorized to reconsider the merits of an [arbitration] award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . .
>
> * * *
>
> But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37-38, 108 S.Ct. 364, 370-71, 98 L.Ed. 2d 286 (1987).

II. The Broad Arbitration Clause of the Joint Venture Agreement and the Broad Notice of Arbitration Provided by Donau and Sudan Were Each Sufficient To Support the Arbitration Award.

Because Valentine did not and cannot demonstrate that its construction of the arbitration award is the only rational explanation, Valentine's contentions concerning insufficient notice and lack of arbitrability of the ownership of the spray dryer are moot. The award recognizes that Valentine "fully owns" the

spray dryer and rejects all adverse claims of ownership by Donau and Sudan. As discussed above, it is far from certain that the arbitrators based the damage award or the continuing royalty upon the ownership issue. Moreover, all of the relevant agreements and documents were before the arbitrators,[5] and Valentine nowhere contends that it was denied the opportunity to present additional evidence. Valentine therefore cannot demonstrate any harm or prejudice caused by these alleged failings which would warrant review by this Court.

In any event, the court below followed the teachings of this Court as well as its own precedent to resolve all doubts in favor of arbitration[6] and properly rejected Valentine's related arguments that ownership of the spray dryer was not an arbitrable issue and that it received insufficient notice that ownership would be an issue. *See* 981 F.2d at 213-14.

With regard to whether the issue of ownership was arbitrable, Valentine argues that "the Lease Agreement was the document that determined ownership of the spray dryer and that

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[5] Valentine conceded to the court below that "the Lease Agreement was made available to the arbitrators." Valentine's Original Brief at 14 (filed June 22, 1992).

[6] *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54, 87 L.Ed. 2d 444 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed. 2d 765 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .").

document did not have an arbitration clause." Petition at 6-7.[7] While Valentine is correct that the Lease Agreement did not contain an arbitration clause, the Lease Agreement was referenced in and attached to the Joint Venture Agreement, which was the primary agreement among the parties. Article 7 of the Joint Venture Agreement provides:

> Any dispute relating to or arising out of this Agreement (including, but not limited to, matters of construction or its actual or alleged breach) shall be decided by arbitration conducted in New Orleans under the Rules of the American Arbitration Association. . . .

(Rec. Vol. 2 at 373-74). This broad arbitration clause subjects all claims "relating to or arising out of" the contract to arbitration. In the present case, the dispute relating to the ownership of the spray dryer clearly falls within the broad arbitration clause of the Joint Venture Agreement as "any dispute relating to or arising out of" the Joint Venture Agreement because that Agreement: (1) established Valentine's obligation to purchase the spray dryer for Valdon's manufacturing process in the first place; (2) expressly referenced the Lease and included it as an attachment; and (3) is part of a series of interlocking agreements. In *AT&T Technologies, Inc. v. Communications Workers of America*, this Court stated that the presumption of coverage is "particularly

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[7] Valentine is incorrect on this point. The Joint Venture Agreement, not the Lease Agreement, is the source of Valentine's obligation "to use its best efforts to purchase the . . . spray dryer . . . and also the additional necessary equipment for Valdon's manufacturing process." (Rec. Vol. 2 at 364). Moreover, the Lease Agreement does not mention the spray dryer but only refers to "property described on Exhibit 'A'." That exhibit was not attached, however. (*See* Rec. Vol. 2 at 422).

applicable" where the arbitration clause is broad and reiterated that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, 89 L.Ed. 2d 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-80, 80 S.Ct. 1347, 1353-54, 4 L.Ed. 2d 1409 (1960)); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 624 n.13, 105 S.Ct. at 3352 n.13. The Fifth Circuit's statement below, 981 F.2d at 213, n.2, that such a broad arbitration clause is intended to reach all aspects of the joint venture is consistent with an earlier decision, *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37-38 (5th Cir. 1990), and decisions of other circuit courts of appeal. *See, e.g., Federated Department Stores, Inc. v. J. V. B. Industries, Inc.*, 894 F.2d 862, 867 (6th Cir. 1990); *Ratheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 9 (1st Cir. 1989).

Valentine also argues that the notice of arbitration in this matter did not comply with the rules of commercial arbitration published by the American Arbitration Association and for that reason fails to comply with the requirements of due process. Petition at 4, 6. This argument is completely without merit for several reasons. First, Valentine did not raise the issue of noncompliance with the notice rules of the American Arbitration Association until it filed its Petition for Rehearing of Appeal on February 16, 1993. Even then, Valentine did not argue that noncompliance with the notice rules of the American Arbitration Association deprived it of due process. *See* Petition for Rehearing of Appeal at 3-6. Because the issue was not timely raised before the arbitrators or courts below for resolution, this Court need not address it. *See Youakim v. Miller*, 425 U.S. 231, 233, 96 S.Ct. 1399, 1401, 47 L.Ed. 2d 701 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court").

Second, the arbitration notice itself requests arbitration of a "dispute concerning a commercial matter involving several contracts signed on the 29th day of June, 1984 . . ." and specifically references each of the agreements, including the Joint Venture Agreement and the Lease Agreement[8]. The notice then describes the overall joint venture and the alleged various breaches by Valentine. It further requests that the arbitrators "determine the amount due and payable to the Plaintiffs...." In view of the broad notice given and commercial arbitration rule 43 of the American Arbitration Association empowering the arbitrators to "grant any remedy or relief which is just and equitable and within the scope of the agreement of the parties. . . ," the broad notice of arbitration was sufficient to support the arbitration award.[9]

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[8] Donau and Sudan can find no objection in the arbitration record by Valentine to the inclusion of the Lease among the agreements subject to arbitration, and Valentine has cited none.

[9] Contrary to its present contentions before this Court, Valentine previously acknowledged to the court below that there was at least one brief discussion of the ownership claim during the presentation of testimony before the arbitrators. *See* Valentine Reply Brief at 5-6 (filed Aug. 14, 1992) (referencing Rec. Vol. 2 at 409-11). Additionally, Donau's and Sudan's discussion of the issue in their reply brief to the arbitrators was in express response to assertions of ownership by Valentine in its prior brief. (Rec. Vol. 2 at 497).

CONCLUSION

It is respectfully submitted that Valentine has failed to sustain its burden of establishing that there are special and important reasons why a Writ of Certiorari should be granted. Valentine has not argued or demonstrated that the Fifth Circuit's decision conflicts with a decision of this Court or another circuit court or that it represents a departure from the accepted and usual course of judicial proceedings. Nor has Valentine presented an important, unresolved issue of federal law. Rather, Valentine merely asks this Court to blindly accept its construction of the arbitration award and to completely ignore all other explanations. Valentine's position is nothing more than a request that this Court correct a perceived error in a lower court decision. Accordingly, Valentine has not shown any reason why this Court should exercise its sound judicial discretion to entertain this case.

Dated June 4, 1993.

Respectfully submitted,

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